Supreme Court, U.S.
FILED
SEP 17 1996

No. 96-123

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
NORTHROP GRUMMAN CORPORATION
AND MAX KILLINGSWORTH,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT NORTHROP GRUMMAN CORPORATION

BRAD D. BRIAN
Counsel of Record
TERRY E. SANCHEZ
MARC T.G. DWORSKY
DANIEL P. COLLINS
MUNGER, TOLLES & OLSON
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
Counsel for Respondent Northrop Grumman Corporation

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

37 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in view of the False Claims Act's express provision that a person bringing a *qui tam* action under the Act "shall have the right to conduct the action," the court of appeals correctly concluded that the government does not have an absolute and unreviewable right to veto a settlement that, after a hearing on the government's objections, the district court explicitly found to be "fair, adequate and reasonable under all the circumstances."

2. Whether this Court has jurisdiction to review the government's purported motion to intervene, which was never properly filed in the district court and thus was not ruled upon by either the district court or the court of appeals.

PARTIES TO THE PROCEEDING

Respondent Max Killingsworth filed this *qui tam* action in the district court in the name of the United States of America, as required by 31 U.S.C. §3730(b)(1).

Petitioner United States of America, as represented by the United States Department of Justice, participated in the proceedings in the district court, but without becoming a formal party to the action in that court. However, petitioner was granted leave to intervene for purposes of its appeals to the United States Court of Appeals for the Ninth Circuit.

Respondent Northrop Grumman Corporation, named as "Northrop Corporation" in the proceedings below, is a publicly traded corporation. It currently has no parent corporation, nor does it have any nonwholly owned subsidiaries.

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Respondent Northrop Grumman Corporation ("Northrop") respectfully prays that this Court deny the government's petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

1. Killingsworth's Original Complaint

On November 9, 1988, respondent Max Killingsworth ("Killingsworth"), a former Northrop employee, commenced this case under the *qui tam* provisions of the False Claims Act ("FCA"). Killingsworth's complaint alleged that, during the course of Northrop's negotiations with the government over non-competitive contracts relating to the MX or "Peacekeeper" missile program, Northrop had a "routine pattern and practice of inflating labor cost estimates and concealing this from the Government." E.R. 11.[1] The complaint asserted that, as a result of this practice, the government was "overcharged on each and every non-competitive [MX] contract award with Northrop." *Id.* The complaint identified five particular contracts as examples of this purported practice, *id.* at 5-10, and alleged that the government's damages were between $60 million and $100 million, depending upon, *inter alia*, "the amount of the contracts affected by the practice of cost inflation," *id.* at 12.

2. The Government's Decision to Decline Intervention

After Killingsworth filed the complaint under seal and *in camera* (as required by the FCA), the government proceeded to investigate the allegations at length — seeking, and obtaining, at least eight separate extensions of time to complete its investigation, thereby extending the under-seal period from November 9, 1988 to June 1990. During its 18-month investigation, the government, by its own account, "executed a search warrant that yielded many thousands of

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[1] All citations of the excerpts of record are from the excerpts filed in C.A. No. 94-56599. References to the district court clerk's record are designated by "Clerk's Rec.," followed by the document control number and, if applicable, the page numbers.

documents, interviewed scores of individuals and engaged in other efforts to investigate the allegations." Supp. E.R. 85. Approximately 100,000 pages of documents were seized or subpoenaed by the government. Clerk's Rec. 73 at 2.

At the conclusion of its investigation, the government elected not to intervene. As the government later explained, it declined to take over this action because it concluded that the alleged practices were pervasive throughout the industry, and it wished to find a better test case that would "most clearly reveal the practice" and "be most likely to yield a judicial determination that this practice is illegal." Supp. E.R. 86.

Upon learning of the government's decision not to participate, Killingsworth's attorneys decided that they would not prosecute the case further. Supp. E.R. 106. The government thereupon negotiated a tentative settlement with Northrop in the amount of $500,000, but the settlement ultimately collapsed. *Id.*[2] On June 11, 1990, after the government had filed a formal notice declining intervention, the district court ordered the complaint unsealed.

3. Killingsworth's Amended Complaint

Killingsworth filed an amended complaint on September 17, 1990. E.R. 15-55.[3] The amended complaint differed from the original complaint in two principal respects. First, it added a cause of action for constructive wrongful discharge, alleging that Killingsworth had no choice but to resign after he informed his superiors that he refused to participate in Northrop's alleged misconduct. *Id.* at 42-44, 53. Second, although the amended complaint (like its predecessor) continued broadly to assert that Northrop had a routine pattern and practice of improperly inflating its labor costs on all of its MX contracts, *id.* at 28, it specifically identified several addi-

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[2]The court of appeals' opinion erroneously describes this agreement as having been reached between Northrop and Killingsworth, rather than Northrop and the government. Pet. App. 12a.

[3]The government's petition incorrectly states that the amended complaint was filed in 1991. Pet. 4.

tional MX contracts allegedly exemplifying this purported practice, *id.* at 22-23.

4. The District Court's First Dismissal of the Action

For more than one year after the filing of the amended complaint, Killingsworth and Northrop vigorously litigated this case, with both parties taking numerous depositions and Northrop making available more than 250,000 pages of documents in response to Killingsworth's various discovery requests. Clerk's Rec. 73 at 2.

After Killingsworth testified in his deposition that he had absolutely no evidence — other than speculation — to support his allegations concerning the additional specific contracts that he had added to the amended complaint, Northrop moved for summary adjudication with respect to those contracts on November 6, 1991. Clerk's Rec. 72. Even though the granting of Northrop's motion would have resulted in the dismissal of these claims with prejudice as to both Killingsworth *and the United States*, the government made no effort to oppose it. Confronted with Northrop's motion, Killingsworth agreed to settle the case, and the parties thereupon agreed to defer the summary judgment hearing, and to suspend all discovery, pending the outcome of the government's review of the settlement. Clerk's Rec. 78.

Under the December 1991 settlement agreement, Northrop and Killingsworth agreed to resolve the *qui tam* claims for $1,000,000 (twice what the government had agreed to in early 1990), and to settle Killingsworth's wrongful termination claim for $3,200,000 (a sum that included attorneys' fees and costs). Pet. App. 12a. The government, however, disapproved of the settlement. While the government did not question the adequacy of the overall settlement amount, it speculated that the parties might have colluded to allocate an inordinate portion to the wrongful discharge claim (in which the government would not share). *Id.* at 13a. Both Northrop and Killingsworth thereafter repeatedly communicated with

the government in an attempt to assuage the government's suspicions. Supp. E.R. 77-78, 176-77, 245-47.

Ultimately, frustrated over the impasse created by the government's skepticism, Northrop expressly invited the government "to intervene for the purposes of settling the False Claims Act claim, possibly over [Killingsworth's] objection if necessary." Supp. E.R. 178. The government refused to do so, yet continued to oppose the settlement.

Similarly frustrated, Killingsworth filed a motion in March 1992 asking the district court to approve the settlement. Pet. App. 13a. The government opposed this motion. *Id.* Once again, the government did not raise any objection to the adequacy of the overall settlement; rather, its sole objection was its fear that the parties might "have colluded to allocate the bulk of the settlement proceeds to a weak, if not totally sham, wrongful discharge claim . . . ." Supp. E.R. 90. The government offered no support for this accusation, other than its professed belief that the wrongful discharge claim was arguably time-barred. *Id.* at 95-96.

On April 16, 1992, in an attempt to satisfy the government's unspecified demand for more money, Killingsworth agreed to surrender $500,000 more to the FCA claim. Supp. E.R. 157. Thus, the revised agreement provided that Northrop would pay $1,500,000 to settle the FCA claim (*three times* the amount that the government previously had been willing to accept); $1,000,000 to settle Killingsworth's claim for attorneys' fees and costs; and $1,700,000 to settle the wrongful termination claim. *Id.* Northrop thereupon filed a memorandum with the district court requesting that the revised settlement be approved and the action dismissed, with or without the government's consent. Supp. E.R. 151-74.

On May 4, the government stated that it would not consent to the settlement or to dismissal of the case. Pet. App. 13a-14a. The district court, however, held that "the Attorney General's consent to dismissal is not required in the present circumstances," and dismissed the action with prejudice as to both Killingsworth and the government. *Id.* at 33a.

5. The Government's First Appeal

The government appealed the dismissal.[4] The court of appeals rejected the government's claim that it had an unconditional right to veto a settlement, holding that such a claim was contrary to the text of the statute, its legislative history, and common sense. Pet. App. 19a-25a. Nonetheless, the court held that the government's objection to a settlement was a form of "limited intervention" permitted by 31 U.S.C. § 3730(c)(3), as long as the government could show "good cause" for its objections. *Id.* at 26a-30a. Accordingly, the court vacated the dismissal and remanded the case for a hearing with respect to the government's allegations of collusion. *Id.* at 30a.

The court of appeals rejected the argument that § 3730(b)(1), which provides that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting," governed here. The court explained that this provision was not without limits, observing that other courts long had recognized that there were limitations on the government's power to block a dismissal. Thus, for example, the government's consent had been held not to be required in cases involving "court-ordered dismissals and other involuntary dismissals." Pet. App. 22a & n.5 (citing *Minotti v. Lensink*, 895 F.2d 100 (2d Cir. 1990), and *United States ex rel. Laughlin v. Eicher*, 56 F. Supp. 972 (D.D.C. 1944)).

The court also noted that the government's extreme interpretation of § 3730(b)(1) was inconsistent with other language in § 3730 that addressed the government's and the relator's respective rights following an initial declination of intervention by the government:

> [T]he government's argument — that without intervention it possesses an absolute right to reject a proposed

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[4] While the first appeal was pending, the parties continued to engage in settlement negotiations. In March 1994, the government offered to settle the entire FCA claim for less than $2.135 million. Supp. E.R. 274-75.

> settlement at any time and for any reason — must be rejected as contradictory to the express language of § 3730(b)(4)(B), which gives the *qui tam* plaintiff "the right to conduct the action." The right to conduct a *qui tam* action obviously includes the right to negotiate a settlement in that action. Section 3730(d)(2), which provides for the proper allocation of *qui tam* proceeds, confirms the relator's right to settle the action if the government declines to intervene: "If the Government does not proceed with an action under this section, the person bringing the action *or settling the claim* shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages."

Pet. App. 24a (reflecting emphasis added by court of appeals, as shown at 25 F.3d 715, 722-23).

Moreover, the court concluded that construing § 3730(b)(1) as giving the government an absolute right to block a voluntary dismissal would not ultimately preclude dismissal of the suit pursuant to a settlement. The court noted that, if the parties settle the action and stop litigating without a dismissal, "the trial court would undoubtedly dismiss the suit for failure to prosecute." Pet. App. 24a-25a. Conversely, the court held that "the government may not force Killingsworth and Northrop to continue litigation by refusing to consent to a settlement." *Id.* at 25a.

The court also held that the government's position was inconsistent with the legislative history, which established Congress' intent " 'to encourage more private enforcement' of the Act." Pet. App. 21a (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 23-24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89). After reviewing the legislative materials, the court held that "Congress' intent to place full responsibility for [FCA] litigation on private parties, absent early intervention by the government or later intervention for good cause," is "fundamentally inconsistent with the asserted 'absolute' right of the government to block a settlement and force a private party to continue litigation." *Id.* at 22a.

Having concluded that the FCA did not give the government an unqualified right to block a settlement of a *qui tam* action in which it had not intervened,[5] the court nonetheless rejected what it characterized as Northrop's "all or nothing" position that the government could object to a settlement only by intervening and taking over the litigation. Pet. App. 28a; *see also id.* at 17a-18a. The court concluded that there was no reason why the government could not intervene for the limited and sole purpose of objecting to the settlement. *Id.* at 29a. The court held, however, that any such limited intervention would be subject to § 3730(c)(3)'s requirement that a post-declination intervention could be granted only upon a showing of "good cause." *Id.* ("We hold that the 'good cause' language [of § 3730(c)(3)] should also apply to the limited intervention sought here by the government.").

Finally, the court concluded that, if the government could establish that Northrop and Killingsworth had structured the settlement so as to deprive the government of its due, that would constitute "good cause." Pet. App. 30a. Accordingly, the court vacated the dismissal and remanded the case with specific instructions to "hold a hearing to determine whether the proposed settlement fairly and reasonably allocates the settlement funds." *Id.*

6. The District Court's Second Dismissal of the Action

On remand, Northrop filed a motion to reaffirm the settlement. Pet. App. 4a. Northrop reviewed each element of the settlement and explained in detail why it was appropriate. In particular, Northrop explained that the settlement sum allocated to Killingsworth's personal claim "was reasonable given the substantial legal uncertainty regarding the applicable

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[5]The court recognized that the various reasons for concluding that § 3730(b)(1) did not confer an absolute right to veto a *qui tam* dismissal would *not* apply during the period in which the government was still investigating the case, because during that period the relator would not yet have acquired the right to control the litigation. Pet. App. 23a-24a.

statute of limitations, and the potential risk and exposure harbored by that claim." Supp. E.R. 53.[6]

After obtaining two extensions of time, the government filed an opposition on July 22, 1994. Clerk's Rec. 124. Once again, the government stated that its "primary concern" was "that insufficient funds were allocated to the [FCA] portion of the deal." *Id.* at 8. For the first time, however, the government also claimed that the expanded scope of the amended complaint's FCA claim justified a higher *overall* settlement. *Id.* at 10. Although the amended complaint had been served on it almost four years earlier, the government claimed that it had been deprived of "the opportunity to explore the new allegations." *Id.* at 5. The government stated that "Killingsworth ha[d] recently pressed [it] to review new evidence that he ha[d] obtained from another Northrop case, evidence which he claims demonstrates the existence of pads in other MX contracts added to his Amended Complaint." *Id.* The government did not, however, attach any of these "new" documents to its opposition. Instead, it attached copies of documents, obtained during the *initial* investigation, that it claimed illustrated Northrop's alleged misconduct, and argued that "[i]f those practices also took place in the contracts Killingsworth has added to the case, then the $1.5 million

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[6] Northrop explained that "[it] — unlike the government — had something to lose as a consequence of any [failed] assault on Killingsworth's wrongful termination claim," and that Northrop therefore "did not share the government's glib assessment that Northrop should have brought a preemptive motion on the limitations issue." Supp. E.R. 69. In fact, case law postdating the April 1992 settlement confirms the validity of Northrop's concerns over the uncertainty surrounding the limitations issue. *See, e.g., Regents of the University of California v. Superior Court*, 33 Cal. App. 4th 1710, 1716 n.5 (1995) ("It appears to be an open question whether a one-year statute . . ., a two-year statute . . . or a four-year statute . . . governs the cause of action for tortious wrongful discharge.") (citations omitted); *see also Neal v. Honeywell Inc.*, 33 F.3d 860, 865-66 (7th Cir. 1994) (holding that a six-year statute of limitations applies to 31 U.S.C. § 3730(h) — a whistleblower-retaliation provision that arguably could have been added to Killingsworth's complaint as late as 1994).

allocated to the FCA claims is woefully inadequate." *Id.* at 11.

In its reply, Northrop asserted that the government's new objection was disingenuous because: (1) the government never had mentioned such a concern before in over two years of litigation; (2) the allegations of the amended complaint were not in fact new, because the premise of even the original 1988 complaint was that Northrop had a "pattern and practice" of inflating its cost estimates for all of its MX contracts; (3) even after the amended complaint was served, the government never made any effort to investigate the additional contracts; and (4) as recently as March 1994, the government had offered to settle all of the FCA claims for less than $2.135 million, thus confirming that "the parties' settlement of the [FCA] claim is well within the range of reasonableness and that the government's attempts to obtain additional funds from the parties is unjustified." Supp. E.R. 264-65, 269-71, 274-75.

Although the hearing on the settlement already had been continued three times, the government filed a request for a fourth continuance less than a week before the rescheduled hearing date. Clerk's Rec. 127. The government claimed that, based on the purported "new" documents — which the government later admitted it had reviewed a year earlier[7] — it

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[7] In a highly improper attempt to alter the record before this Court, the government's petition (p.8 n.3) seeks to withdraw the government's concession, made repeatedly in the court below, that Killingsworth "initially showed the new documents to an Assistant United States Attorney in 1993." U.S. Br., C.A. 94-56599 at 11; *see also* Reply Br., C.A. 94-56599 at 1, 9. In doing so, the government seeks to nullify the court of appeals' conclusion that "Killingsworth provided copies of the new documents to an Assistant United States Attorney in 1993," Pet. App. 3a — a fact that the court relied upon in affirming the district court's judgment in this case. *See* Pet. App. 6a n.3. The government's argument is based, not on anything in the record, but on the government's unsworn, hearsay representation that the (unnamed) Assistant U.S. Attorney in question "has since informed us that our earlier statement was in error." Pet. 8 n.3. As explained below, the government's use of inadmissible hearsay to contra-

wanted additional time in order to decide whether to intervene. *Id.* at 2-4. Once again, however, the government did not present any of these alleged new documents to the district court.

At the hearing on August 22, the government began by renewing its request for a fourth continuance. E.R. 80. The government informed the court that it had now decided to file a motion to intervene, and it therefore requested additional time "to allow the government to file that motion." *Id.* at 80-81. After hearing argument on the request for a continuance, the court denied it. *Id.* at 87. The district court then invited the government to begin the hearing on whether the settlement should be affirmed. *Id.* at 87-88.

Government counsel responded by stating that "we have submitted a brief that sets forth all of the initial reasons for objecting to the settlement agreement and I'm not going to repeat that to the Court." E.R. 88. The government did not offer any additional evidence, and did not request an opportunity to cross-examine any of the percipient witnesses who participated in the settlement — Killingsworth, Northrop's attorneys (including in-house counsel), and Killingsworth's former attorney — all of whom were present in the courtroom, *id.* at 79. Moreover, despite the fact that government counsel claimed that the "new documents" were "intertwined completely with the question of whether the settlement is fair and reasonable," *the government — for the third time — did not present those documents to the court. Id.* at 88.

After additional argument, the court rejected the government's objections and reaffirmed the settlement. *Id.* at 90. The court thereafter issued a written order finding that the settlement "was fair, adequate and reasonable under all the

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dict a statement of fact in the court of appeals' opinion is wholly improper. *See infra* at 17-18. In any event, the record before the district court contains a sworn declaration from a government attorney stating that he had been shown the documents in March 1994 — demonstrating that the government had been aware of the supposedly "new" documents for *at least five months* before the date of the hearing. E.R. 75-76.

circumstances," and rejecting the government's claim that the parties had improperly allocated the settlement proceeds as "not supported by the evidence." Pet. App. 8a.

Two days after the hearing, the government belatedly attempted to file a motion to intervene, but the district court's clerk's office refused to accept it for filing because the court already had terminated the case by reaffirming the settlement. Pet. App. 5a n.2.

7. The Government's Second Appeal

The government again appealed. The court of appeals affirmed, holding that the district court "properly determined the reasonableness and fairness of the proposed settlement." Pet. App. 5a. With respect to the government's claim that its new evidence — albeit never presented — should have made a difference to the outcome, the court explained that its prior order effected only a "limited remand" that merely required the district court to hold a hearing on whether Killingsworth and Northrop "colluded to shift the majority of the settlement funds to Killingsworth's personal claim and attorney's fees — thereby depriving the government of its fair share." *Id.* at 5a-6a. Because the district court "properly followed our remand order," the court of appeals held that the district court "did not err by refusing to consider the alleged new evidence relating to other issues." *Id.* at 6a.

The court also rejected the government's argument that the district court should have allowed "additional time for discovery" concerning the "new" evidence before holding the hearing on the settlement. *Id.* at 6a n.3. The court noted that the government "concedes that it was aware of the alleged new evidence since 1993," but nonetheless "failed to conduct discovery between its receipt of such evidence in 1993 and the court's dismissal of the action in August 1994." *Id.* Accordingly, the court held that the district court "properly refused the government's eleventh-hour discovery request." *Id.*

Finally, the court rejected the government's attempt to "appeal" the clerk's refusal to accept the late motion to inter-

vene. *Id.* at 5a n.2. The court rejected as "nonsensical" the government's argument that "the clerk's return of the motion is tantamount to a denial of the motion, and, therefore, appealable." *Id.* The court held that, although the government had informed the district court at the August 22 hearing that it intended to file such a motion, the purported motion "was never properly before the district court and we decline to address it for the first time on appeal." *Id.*

REASONS FOR DENYING THE PETITION

A. The Question Whether the Government Has an Unconditional Right to Veto a Court-Approved *Qui Tam* Settlement Does Not Warrant This Court's Review

The government correctly concedes that the court below was "the first court of appeals to address the question" whether the government has an absolute and unconditional right to veto a settlement that has been found by the courts to be fair, adequate, and reasonable. Pet. 21. Accordingly, as the government also concedes, "[n]o circuit conflict exists on the issue." *Id.*

That the first question presented by the petition is novel and involves no split among the circuits is reason enough to deny review. Moreover, the government has failed to demonstrate the sort of compelling reasons that might conceivably justify this Court's immediate resolution — without the benefit of any additional guidance from other courts — of what the court of appeals described as a "difficult and novel question." Pet. App. 20a. Furthermore, the government's procedural mishandling of this case in the courts below — coupled with the fact that the settlement was expressly found by the district court to be "fair, adequate and reasonable" — makes this case an exceptionally poor vehicle for addressing this issue, which in any event was correctly resolved by the court of appeals. Review should be denied.

1. There Are No Compelling Reasons Why This Court Should Prematurely Address this Question, Which is Novel and Involves No Circuit Conflict

The government claims that this Court's immediate attention to the first question is necessary, despite the lack of a circuit conflict, because "the court of appeals' rulings in this case will have an immediate and serious impact on a large portion of existing and future *qui tam* litigation" in that it "depriv[es] the Attorney General of the right to prevent unreasonable *qui tam* settlements." Pet. 21.

The government's dire predictions are based on a fundamental misapprehension. The court of appeals did *not* hold that the Attorney General lacks power to prevent "unreasonable *qui tam* settlements." To the contrary, the court held that the government has considerable powers in this regard. First, the government can intervene as a party-litigant and thereby "control the litigation," including any settlement. Pet. App. 24a. Second, the court held that, even "without formal intervention and without proceeding with the litigation," the government still can block a settlement simply by showing "good cause," *i.e.*, by showing that the settlement is improper. *Id.* at 28a-29a. Indeed, the government expressly concedes that, "under the court of appeals' theory," a settlement cannot be approved "if the district court finds that the Attorney General's objections have merit or that the settlement is otherwise improper." Pet. 17. Because the government can thus prevent approval of any settlement it can demonstrate is unreasonable — something it was unable to do here — the court of appeals' decision merely amounts to the rather unremarkable holding that, absent formal intervention, the government lacks the power to block *reasonable* settlements. The court of appeals' decision in this case thus will have an impact only in the presumably rare circumstance in which the government objects to a settlement, but does so mistakenly, unreasonably or arbitrarily, or for an improper purpose.

Needless to say, there is no public interest, much less a vital one, in ensuring that the Attorney General has an unreviewable and standardless power to veto proper settlements. An Article III court, being a truly disinterested body, has no incentive to approve settlements that are contrary to the public interest. The court of appeals' refusal to recognize an *unconditional* veto thus will *not* "substantially complicate the process of negotiation and settlement of *qui tam* cases," nor will it require the government to "interven[e] in an increased number of cases." Pet. 22. Rather, it merely places on the government the presumably modest burden of substantiating its concerns to the satisfaction of an impartial tribunal. If a settlement genuinely threatens the public interest, surely the government — with its substantial powers for coercive investigation — will be able to corroborate its concerns on the record. Thus, it is virtually inconceivable that the decision below will have any adverse impact on the Attorney General's ability "to protect the interests of the government and of the public." *Id.* at 10.[8]

If anything, the decision below *enhances* the likelihood that *qui tam* suits will be resolved in a fair and equitable manner. Although the government makes much of the fact that, in a situation where the *qui tam* claim is paired with a personal claim, the relator has a strong interest in attempting to allocate as much of the settlement as possible to the personal claim, Pet. 13, it fails to note that it, too, has a self-interest that may cause it to push for a settlement that does not represent the most equitable resolution of *both* claims. Thus, notwithstanding the government's self-serving representation that it "has no interest in rejecting a reasonable settlement," *id.* at 17, the government in such a case has a significant incentive to use its leverage over the *qui tam* claim

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[8] The government also states that it needs an absolute and unconditional veto in order to preclude settlements in which the relator releases the contractor from liability for conduct not alleged in the complaint. Pet. 13-14. There is no basis for supposing that courts will approve such settlements over the government's objections, if well-founded.

to exact as much as possible from the settlement of the personal claim. The relator (who stands to lose the most from such reallocation) will, of course, strongly resist it. The contractor is caught in the middle, and—most importantly—is unable to secure a separate peace on the *qui tam* claim because of the government's refusal to intervene and settle the claim over the relator's objections. By requiring the government either to intervene in the case or, at the very least, to substantiate its objections, the decision below ensures that the government will limit the use of its leverage to those cases in which there is good reason for objecting.[9]

Put simply, the decision below does not involve any broad issue of surpassing national importance that requires this Court's immediate intervention into this novel and developing area of the law.[10]

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[9] Ironically, as the court of appeals observed, instead of furthering the public interest, the government's claim to an absolute veto is at odds with the principal purpose of the 1986 amendments to the FCA, which was to enhance " 'the ability of the citizen who brings such a suit to *follow through with the litigation*. . . .' " Pet. App. 21a (quoting 132 Cong. Rec. H6474, H6479 (1986)) (emphasis added). Congress recognized the importance of *qui tam* relators to the enforcement of the FCA and sought " 'to encourage more private enforcement' of the Act" by " 'increas[ing] incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.' " *Id.* (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 2, 23-24, *reprinted* in 1986 U.S.C.C.A.N. 5266, 5267, 5288-89).

[10] The government also claims that review is warranted because the result below "threaten[s] to immunize a very substantial degree of fraud." Pet. 22. This claim is based on alleged "newly discovered evidence" showing that the "potential fraud in this case [is] in excess of $110 million." *Id.* As explained below, however, the evidence in question is not new and, more importantly, *is not even in the record in this case. See infra* at 17-19. Moreover, the government's allegations concerning the size of the damages involved in this case must be taken with a very large grain of salt. Such self-serving estimates often bear only a limited relationship to the case's ultimate settlement value, given the numerous difficulties and uncertainties in establishing liability in complex litigation. In this regard, it is instructive to consider the disparity between the government's previous claims about the size of the damages and the

2. The Question is Poorly Presented by the Facts of This Case

Even if the first question presented were otherwise worthy of this Court's review, the record makes clear that this case is a poor vehicle for addressing it. As the record shows, the government's inability to block the settlement in the lower courts was directly attributable to its own failure to substantiate its objections. In addition, the presentation of the issue here is substantially complicated by the government's shifting strategic decisions and its repeated procedural defaults in the lower courts. Even if this Court were inclined to address the question presented without any circuit conflict, it would be advised to await a case in which the government has made a better record below for objecting to a *qui tam* settlement, but nonetheless still has lost. In such a case (unlike this one), the government's claim of an unconditional right to block a settlement might be presented in meaningful relief, because the proximate cause of the government's failure to prevail would be its lack of an absolute veto, rather than its inability to substantiate any grounds for disapproving the settlement. The record in this case, however, is too procedurally messy to make a grant of certiorari appropriate (even assuming that the question were otherwise worthy of review).

From the time of the initial settlement in December 1991 until the court of appeals' first decision in May 1994, the government's sole objection to the settlement was that the proceeds were unfairly allocated to Killingsworth's personal claim. Indeed, that is why the court of appeals' mandate in *Killingsworth I* was expressly limited to that issue. *See supra*

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amount at which the government was willing to settle the case. As recently as March 1994, the government offered to settle the entire FCA case for less than $2.2 million, *see* Supp. E.R. 274-75, even though the government asserted that, *before receiving the "new" evidence*, it already had evidence allegedly showing "hidden management reserves of nearly *$60 million* in numerous contracts." U.S. Br., C.A. 94-56599 at 32 (emphasis added).

at 7, 11. That theory — which was expressly found by the district court to be unsupported by the evidence, *see* Pet. App. 8a — was all but abandoned by the government on the remand from *Killingsworth I* (and is scarcely mentioned in its petition in this Court).

On remand, however, the government made an abrupt about-face and claimed, for the first time, that the *overall amount* of the settlement undervalued the FCA claim. In order to excuse its having failed to raise this objection earlier (despite having received a copy of the amended complaint in 1990), the government claimed that the objection was based on "new evidence." The court of appeals, however, specifically found that because the government had been aware of this alleged evidence since at least 1993 but had opted to do nothing about it, the district court did not abuse its discretion in refusing the government's "eleventh-hour" request for additional time to present this purported evidence. Pet. App. 6a n.3. The government thus never provided any evidentiary basis for its newfound objection.

The government seeks to avoid these serious obstacles in the record by taking the extraordinary step of proffering inadmissible facts that are outside the record and then asking this Court to disregard the lower court's holdings that were based on the contrary facts presented to it. *See* Pet. 8 n.3; *id.* at 20 n.8; *see also* note 7 *supra*. Specifically, the government asks this Court to ignore the court of appeals' conclusion that "Killingsworth provided copies of the new documents to an Assistant United States Attorney in 1993," Pet. App. 3a, and to do so based on the government's hearsay representation that the attorney "has since informed us that he did not see the documents in question until July, 1994." Pet. 20 n.8; *see also id.* at 8 n.3. This request is highly improper:

> Apart from the fact that the statement is unsworn, the statement itself is not in the record of the proceedings below and therefore could not have been considered by

> the trial court. *Manifestly, it cannot be properly considered by us in the disposition of the case.*

Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 n.16 (1970) (emphasis added; citation omitted); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 n.5 (1986) (opinion of Powell, J.) (noting the "heretofore unquestioned rule that this Court decides cases based on the record before it").[11]

The government also asserts (*see* Pet. 20 n.8) that, even if it cannot now retract its representation that it had been aware of the evidence since 1993, the court nonetheless erred in criticizing it for "fail[ing] to conduct discovery between its receipt of such evidence in 1993 and the court's dismissal of the action in August 1994." Pet. App. 6a n.3. The government protests that it "could not have conducted formal discovery at a time when the case had been dismissed with prejudice and was pending on appeal in the Ninth Circuit." Pet. 21 n.8. This argument is completely irrelevant. The court of appeals' point was that the government failed to do *anything* to investigate the additional allegations. The government, of course, is no ordinary litigant, and has at its disposal powerful means for obtaining information that are not available to private parties. Nonetheless, the record shows that upon receiving the amended complaint in 1990, the government merely made a request to Killingsworth to provide any evidence in support of the additional charges, and then let the matter drop for four years when Killingsworth did not provide anything. *See* Clerk's Rec. 127 at 2 (Govt.'s Ex Parte Application for Continuance).[12] Thus, in holding that the government exhibited a lack of diligence in its handling of this case, the court of

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[11] The government's effort to overturn the court of appeals' holdings that were based on the 1993 date also comes much too late because the government failed to raise this point in its petition for rehearing below. Far from raising any objection, the government's petition again expressly conceded that Killingsworth had shown the "new" documents to an Assistant U.S. Attorney in 1993. Pet. for Rehearing, C.A. 94-56599 at 7.

[12] Indeed, the government apparently was willing to let the additional allegations be dismissed with prejudice, inasmuch as it made no effort to oppose Northrop's partial summary judgment motion. *See supra* at 3.

appeals reached the only possible conclusion on the record here.[13]

In any event, even assuming (contrary to the record) that the evidence was "newly discovered" and that the government was diligent in investigating the case, the government committed a further procedural default that makes it impossible to criticize the lower courts' reaffirmation of the settlement: despite numerous opportunities to do so, *the government never presented the alleged new documents to the district court.*[14] The district court and the court of appeals thus simply had no evidentiary basis on which to credit the government's assertions that the settlement undervalued the FCA claim, nor is there any such basis in the record before this Court.[15]

Yet another illustration of the government's mishandling of this case in the courts below is its conduct with respect to intervention. In 1992, the government could have avoided the issues presented here simply by filing a motion to intervene: as a party-litigant, the government then would have had abso-

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[13]The government unfairly suggests that Northrop improperly "withheld" the "new" documents from Killingsworth. Pet. 8. There is no basis in the record for this assertion, which was never accepted by the lower courts. On the contrary, Northrop properly complied with all of its discovery obligations in this case. The government fails to note that, shortly after Northrop filed its motion for summary adjudication with respect to the amended complaint's additional allegations, Killingsworth and Northrop agreed to settle the case, and discovery *was stayed* by the district court, pursuant to a stipulation with Killingsworth's counsel, while the government reviewed the settlement. *See* Clerk's Rec. 78.

[14]The government's petition does not (and cannot) expressly deny this fact. It does, however, repeatedly use language that might be misunderstood as suggesting otherwise. *See, e.g.*, Pet. 8 (government "inform[ed] the district court of the new evidence"); *id.* at 9 (new evidence was "proffered by the government"); *id.* at 19 (government "relied on that evidence" in challenging the settlement).

[15]The government's argument that the courts below erred in refusing to consider the "newly discovered evidence," Pet. 19-20, is thus unavailing. There simply was no such new evidence in the record to consider.

lute control over any settlement. *See Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986). Indeed, in order to break the impasse that then existed, Northrop specifically requested that the government move to intervene. Supp. E.R. 178. And at an April 1992 status conference, the district court ordered the government to file such a motion if it wished to object to the settlement. Pet. App. 13a. The government nonetheless steadfastly refused to intervene, even telling the court of appeals at oral argument in June 1993 that it would not intervene if the case were remanded. Supp. E.R. 7.

On remand, however, after the propriety of the settlement had been fully briefed and it was once again clear that the government's concerns were unfounded and that the settlement would be reaffirmed, the government reversed course and sought a continuance of the settlement hearing so that it might file a motion to intervene. But by the time the government was ready to get on board, the train had already left the station: the government presented its motion for filing two days *after* the settlement had already been approved, and the district court clerk's office refused to accept it. *See infra* at 28. Consequently, the court of appeals found that the motion "was never properly before the district court." Pet. App. 5a n.2. The government thus failed to make any use in this case of its right to request intervention — a right that ordinarily functions as the primary means by which the government is able to exercise ultimate control over the course of litigation conducted by relators in the name of the United States.

If, in future cases (unlike this one), the government has good grounds for contending that a settlement is against the public interest, it seems unlikely that the government will commit the same sort of repeated procedural blunders that characterized its handling of this case. Accordingly, if and when a case arises in which the government has made a good factual record and taken reasonable steps to block a *qui tam* settlement, but the settlement is nonetheless approved, then perhaps the statutory question will be well presented for review (assuming *arguendo* that the question of the govern-

ment's ability to veto *reasonable* settlements is deemed appropriate for review at all).

3. The Court of Appeals Correctly Concluded That the False Claims Act Does Not Grant the Government an Unconditional and Unreviewable Right to Veto a *Qui Tam* Settlement That Has Been Found by the Courts to be Fair, Adequate, and Reasonable

This Court should also deny review because the decision below is unassailably correct. Moreover, because the issues involved are complex, the lower courts should be allowed to develop further this novel area of the law unless and until resolution by this Court becomes necessary.

Section 3730(b)(1) provides:

> A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C. § 3730(b)(1). The government argues that this language is "unambiguous" and "ought to have ended the court of appeals' inquiry" in the government's favor. Pet. 12. The government's simplistic position is inconsistent with basic canons of statutory construction.

As an initial matter, the government itself expressly concedes that the statutory language cannot be read with the literalism it urges upon this Court. In a footnote at the very end of its discussion of this issue, the government acknowledges that the Attorney General's consent is not required "[w]here a court dismisses a *qui tam* action on the merits." Pet. 18 n.7. But this concession is fatal to the government's position. The limitation that the government concedes (that its consent is not required for "merits" dismissals) is no more apparent from the supposedly "plain language" of the statute on which it relies than is the limitation that the government rejects (that the government may withhold its consent only

for "good cause"). The question in both cases is whether such a limitation is reasonably implied by the statutory language. For several reasons, the court of appeals' affirmative answer to that question is correct.

In resolving this question, the court of appeals properly looked to "the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), and correctly noted that the government's claim of an absolute right to veto a settlement was inconsistent with several other provisions of the statutory text. In particular, the court of appeals noted that the government's dismissal rights under § 3730(b)(1) must be read in light of the provisions of the FCA delineating the government's and the relator's respective rights following an initial declination of intervention by the government. Pet. App. 22a-24a.

After such a declination, the relator has the "right to conduct the action," 31 U.S.C. § 3730(b)(4)(B); *see also id.* § 3730(c)(3), and the court may "permit the Government to intervene" *only* "upon a showing of good cause," *id.* The court correctly concluded that the government's claim to an unconditional veto is "contradictory to the express language of § 3730(b)(4)(B), which gives the *qui tam* plaintiff 'the right to conduct the action' " — a right that "obviously includes the right to negotiate a settlement in that action." Pet. App. 24a. Moreover, the court properly held that objecting to a settlement and blocking a dismissal were a form of "interven[tion]" and were therefore covered by the "good cause" language of § 3730(c)(3).[16] Pet. App. 28a-29a. These provisions together make clear that the government may not block a settlement and dismissal absent good cause.[17]

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[16] Indeed, Northrop argued below that such a veto could be accomplished only by intervening as a proper party-litigant in the suit. The court of appeals rejected the latter conclusion, but agreed that the government's objection was nonetheless a form of intervention and was therefore subject to § 3730(c)(3)'s "good cause" requirement.

[17] By recognizing a governmental right to "limited intervention" to challenge a settlement (subject to a showing of "good cause" under

The government attacks this analysis by asserting that there is "no basis" for concluding that the phrase "right to conduct the action" includes the right to settle it. Pet. 16. That argument, however, is at odds with the plain meaning of the phrase. *See, e.g.*, Webster's Third New International Dictionary 474 (1966) (defining "conduct" as "to have the direction of: RUN, MANAGE, DIRECT"). More important, the government's argument is inconsistent with the language of § 3730(d)(2), which (in discussing the appropriate allocation of any recovery under the FCA) expressly recognizes that the relator has the right to "settl[e] the claim." *See* 31 U.S.C. § 3730(d)(2) (referring to the relator as "the person bringing the action or *settling the claim*") (emphasis added). Moreover, the right of a relator to settle a claim was expressly recognized in the House Report on the 1986 amendments to the FCA. *See* H.R. Rep. No. 660, 99th Cong., 2d Sess. 31 (1986) (noting that the relator may proceed with the action "to judgment or settlement").

The government also criticizes the court of appeals' conclusion that the consent provision of § 3730(b)(1) is operative only during the initial period during which the complaint remains under seal. Pet. 14-15. That conclusion, however, follows logically from the fact that the relator's right to "conduct the action" — a right that limits the government's power to block settlement and dismissal — simply does not arise until after the under-seal period has expired and the govern-

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§ 3730(c)(3)), the court of appeals' construction had the felicitous consequence of effectively according the government objection rights comparable to those provided to the relator under § 3730(c)(2)(B). Pet. App. 29a-30a. The government's description of the court of appeals' opinion mentions this resulting equivalence, *but fails to mention that the court of appeals' reasoning on this point was based on § 3730(c)(3)*. Pet. 7-8, 12 n.5. Indeed, if one were to read only the government's petition, one would be left with the mistaken impression that the court of appeals simply decided to take the provisions of § 3730(c)(2)(B) — which describe the relator's hearing rights — and apply them *mutatis mutandis* directly to the government.

ment has declined the case. *See* 31 U.S.C. § 3730(b)(4)(B), (c)(3).

The government protests that its power to block a dismissal under § 3730(b)(1) should be read to trump the relator's right to "conduct the action," and not vice versa, but there is no basis in the statutory language for the government's prioritization of these provisions. By contrast, there *is* textual support for the court of appeals' conclusion that nothing in § 3730(b)(1) limits the relator's right to settle a case. The predecessor to § 3730 that was in effect prior to the codification of Title 31 in 1982 did *not* state that the Attorney General's consent was necessary before a *qui tam* suit could be "dismissed"; rather, it said that, without such consent a suit could not be "withdrawn or discontinued." *See* 31 U.S.C. § 232(B) (1976 ed.). That language, which may properly be considered in construing the meaning of the current statute,[18] clearly suggests that § 3730(b)(1) applies "only to cases" in which a *qui tam* plaintiff "sought to withdraw an action *before the United States had [an] opportunity to assess its merits or intervene in its conduct.*" *Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1990) (emphasis added).[19]

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[18] The change in language that occurred when Title 31 was codified was not intended to change the meaning of the provision. *See Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1990). *See also Cass v. United States*, 417 U.S. 72, 82 (1974) (given that "the revisers expressly stated that changes in language resulting from the codification were to have no substantive effect," the clear meaning of predecessor statute was controlling in construing post-codification version).

[19] The government erroneously contends that this limitation renders § 3730(b)(1) "virtually meaningless," because "a voluntary dismissal made before service of the defendant's answer is without prejudice." Pet. 14-15 (citing Fed. R. Civ. P. 41(a)(1)). What Rule 41(a)(1) actually says is that "*[u]nless otherwise stated in the notice of dismissal or stipulation [for dismissal]*, the dismissal is without prejudice . . ." (emphasis added). Indeed, in this regard, Rule 41(a)(1) makes absolutely no distinction between a voluntary dismissal prior to service of an answer (which is accomplished by filing a "notice of dismissal") and a voluntary

In any event, even assuming that § 3730(b)(1) applies throughout the pendency of a *qui tam* lawsuit, the government's argument for an absolute veto still fails. The government overlooks an important aspect of the language of § 3730(b)(1) that flatly disproves its argument. The statutory text requires the consent of *both* "the [district] court and the Attorney General," and it has long been recognized that *district courts* themselves do not have the kind of unconditional and unreviewable authority that the Attorney General claims that this provision confers. On the contrary, it repeatedly has been held that, where the approval of a district court is necessary to effectuate a settlement and dismissal,[20] the district court may not disapprove the settlement without "sufficient reason." *See, e.g., Little Rock School Dist. v. Pulaski County Special School Dist.*, 921 F.2d 1371, 1393 (8th Cir. 1990) (reversing district court's refusal to approve settlement in desegregation case).[21] Because the term "consent" in § 3730(b)(1), when applied to the phrase "the court," must be understood as referring only to a conditional power to withhold consent for sufficient reason, that very same word,

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dismissal after service of an answer (which is accomplished by filing a stipulation).

[20] Ordinarily, dismissal or termination of a case pursuant to a settlement does not require the approval of the court, but is accomplished simply by filing with the court a stipulation signed by all parties. *See* Fed. R. Civ. P. 41(a)(1)(ii). Court approval is required, however, in certain cases, *e.g.*, if the case is a class action, if the settlement involves a consent decree, or if an applicable statute specifically requires court approval.

[21] *See also In re Smith*, 926 F.2d 1027, 1028-30 (11th Cir. 1991) (issuing writ of mandamus where district court relied on improper reasons in refusing to approve settlement in case under federal Education of the Handicapped Act); *Durrett v. Housing Auth. of the City of Providence*, 896 F.2d 600, 604-05 (1st Cir. 1990) (reversing district court's refusal to approve class action settlement in Fair Housing Act suit); *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351-52 (6th Cir. 1986) (reversing district court's refusal to approve settlement where district court "condition[ed] its approval of the consent decree upon amendment of the decree to allow a third party, who had not asserted an independent claim, to receive part of the settlement monies").

when applied to the phrase "the Attorney General," must be understood as connoting a comparable limitation on the Attorney General's power to withhold consent when the government declines to intervene. *See BankAmerica Corp. v. United States*, 462 U.S. 122, 129 (1983) ("[W]e reject as unreasonable the contention that Congress intended the phrase 'other than' to mean one thing when applied to 'banks' and another thing as applied to 'common carriers,' where the phrase 'other than' modifies both words in the same clause."). This textual analysis leads to exactly the same conclusion that the court of appeals reached — namely, that the government may not withhold its consent absent "good cause."[22]

Moreover, even if the government is correct that § 3730(b)(1) applies to all *voluntary* dismissals pursuant to a settlement, the court of appeals correctly held that this would be insufficient to provide the government the power it seeks. Pet. App. 24a-25a. The parties still could enter into a settlement (contingent, of course, on the suit ultimately being dismissed with prejudice) and the court still could approve it. The defendant then could move for involuntary dismissal for nonprosecution, and *that* dismissal would not require the government's consent. *See Minotti*, 895 F.2d at 103-04 (holding that government's consent is unnecessary where court dismisses *qui tam* suit as a sanction for failure to comply with discovery orders). The only way in which the government could avoid that dismissal would be by intervening — which would require a showing of "good cause" under 31 U.S.C. § 3730(c)(3). The end result would be the same: the government would have to show good cause before it could defeat a dismissal and settlement.[23]

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[22] Under this analysis, the court of appeals also was correct in its conclusion that, *prior* to the expiration of the under-seal period, the government has, effectively, an absolute right to block dismissal, because the government's need to make a timely initial decision whether to intervene always will constitute good cause for barring a dismissal.

[23] Indeed, a contrary conclusion also would lead to peculiar results by permitting the government to be both spectator and quarterback: while

For all of these reasons, the court of appeals correctly concluded that the government does not have an absolute and unreviewable right to veto the settlement and dismissal of a *qui tam* case in which it has not intervened.

B. Because the Government Never Made a Proper Motion to Intervene and the Lower Courts Never Ruled on Any Such Motion, Neither the Decisions Below Nor the Record Raise the Second Question Presented in the Petition — a Question That in Any Event Would Not Warrant This Court's Review

The second question presented by the petition is "[w]hether the court of appeals erred in refusing to allow the Attorney General to intervene to take over prosecution of [the] *qui tam* action . . . ." Pet. at (I). The record, however, makes clear that the government never made a proper motion to intervene in the district court and that, consequently, neither the district court nor the court of appeals ever ruled on such a motion. Because this question was never properly presented to the lower courts, this Court lacks jurisdiction to decide it. Review should be denied.

As the transcript of the August 22, 1994 hearing before the district court makes clear, the government never made a motion to intervene at that hearing. On the contrary, it merely informed the court that it *wanted to file* such a motion, and the only request that it made at the hearing was for a *continuance* "to allow the government to file that motion." E.R. 80-81. The district court, however, held that the request for additional time was not well taken, and ordered that the hearing on the settlement be held as scheduled. *Id.* at 87-88. After hearing argument on the propriety of the settlement, the court rejected the government's arguments and reaffirmed the settlement. *Id.* at 90-91.

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insisting on standing at the sidelines, the government could hold the case in limbo despite the parties' desire to stop litigating, and despite the court's conclusion that the settlement is entirely proper.

Two days *after* the hearing, the government belatedly attempted to file a motion to intervene, but the motion was rejected for filing by the district court clerk's office because the case had already been closed by virtue of the court's decision to reaffirm the settlement. Pet. App. 5a n.2. In apparent recognition of the fact that it had failed to secure a *judicial* ruling on its purported motion, the government took the unusual step of designating, in its notice of appeal, that it sought to appeal from "the return of the Government's Motion to Intervene by the Clerk of Court for the Central District of California which return was tantamount to a denial of the Government's motion." E.R. 114-15.

Tellingly, the government never asserted in the court of appeals that it had made a motion to intervene at the August 24 hearing. Rather, it conceded that it merely had informed the district court at the hearing that it "intended to file a motion to intervene" and noted that it requested a continuance of the hearing so that that motion could "be heard before a decision on the motion to reaffirm the settlement." U.S. Br., C.A. 94-56599 at 13.

In its petition in this Court, the government carefully refrains from directly contradicting any of the foregoing.[24] Indeed, rather than saying anything about the record before the

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[24]The petition does, however, use a number of sentences that, while literally true, might be misread to suggest that such a motion was made. Thus, for example, the petition asserts that at the hearing "government counsel informed the court that the government wished to intervene and take over the litigation," *but the petition never mentions that this comment was made in connection with a motion for a continuance, not a motion for intervention.* Pet. 9. And while the petition is literally correct in stating that the government at the hearing "asked that its request for intervention be heard and decided before the court ruled on the pending Northrop motion to reaffirm the settlement," *id.*, that comment must not be read to suggest that the government was merely discussing the scheduling of two *pending* motions. There was no pending motion to intervene; the whole point of the government's request at the hearing was that it wanted the hearing on Northrop's motion postponed so that it could file such a motion to intervene.

district court, the government relies on a sentence *in the court of appeals' opinion*, which shows, according to the government, that "[t]he court [of appeals] acknowledged that the government had sought to intervene early in the hearing and that the district court had declined to address that request." Pet. 20 n.8 (citing Pet. App. 5a n.2). The government's characterization, not of the record of the hearing, but of the court of appeals' description of that record, is irrelevant. Regardless of how the court of appeals described the proceedings in the district court, the record before the district court remains what it is, and that record simply does not contain such a motion to intervene.[25]

Because the government never presented a proper motion to intervene, it never obtained a ruling on such a request from the lower courts. Indeed, the court of appeals expressly stated that, because the motion was not properly filed, "we decline to address it for the first time on appeal." Pet. App. 5a n.2. Consequently, there is nothing for this Court to review.[26]

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[25] In any event, the government's argument is entirely inaccurate because the court of appeals did not in fact say that the government "had sought to intervene early in the hearing." Pet. 20 n.8. Rather, all that the court of appeals said was that the government "raised its motion for intervention before the district court." Pet. App. 5a n.2. That, quite obviously, was merely a reference to the fact that the government, in arguing for a continuance, expressed its intention to file such a motion in the future. Similarly, the court's comment that the "government did not attempt to resurrect the motion at some later point in the remand hearing" was a reference to the fact that, after the request for a continuance was denied, the government did not proceed to make a motion to intervene. *Id.*

[26] Moreover, even assuming (contrary to the record), that the question of intervention had been presented and adjudicated at the August 24 hearing, the presentation of that factbound issue here would be fatally complicated by many of the same procedural errors discussed above with respect to the first question presented. *See supra* at 16-20.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: September 16, 1996

Respectfully submitted,

BRAD D. BRIAN
Counsel of Record
TERRY E. SANCHEZ
MARC T.G. DWORSKY
DANIEL P. COLLINS
MUNGER, TOLLES & OLSON
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
Counsel for Respondent
Northrop Grumman Corporation